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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1939

No. [illegible]

UNITED STATES OF AMERICA, APPELLANT,

vs.

EMPLOYERS LABORERS ASSOCIATION OF CHICAGO AND VICINITY, LOCAL NO. 76 OF WOOD, WIRE AND METAL LATHERS INTERNATIONAL UNION OF CHICAGO, ETC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

Probable jurisdiction noted December 18, 1939

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 439

UNITED STATES OF AMERICA, APPELLANT,

vs.

EMPLOYING LATHERS ASSOCIATION OF CHICAGO AND VICINITY, LOCAL No. 74 OF WOOD, WIRE AND METAL LATHERS INTERNATIONAL UNION OF CHICAGO, ETC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

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1-3 In United States District Court, Northern District of Illinois, Eastern Division

Civil Action No. 52 C 1639

Equitable Relief Sought

UNITED STATES OF AMERICA, PLAINTIFF

v.

EMPLOYING LATHERS ASSOCIATION OF CHICAGO AND VICINITY; LOCAL NO. 74 OF WOOD, WIRE AND METAL LATHERS INTERNATIONAL UNION OF CHICAGO, ILLINOIS AND VICINITY; HARRY D. FOLLETT; AND EDWARD D. CHOUINARD, DEFENDANTS

COMPLAINT—Filed July 31, 1952

The United States of America, by its attorneys, acting under the direction of the Attorney General, brings this complaint against the defendants named herein, and alleges as follows:

I

JURISDICTION AND VENUE

1. This complaint is filed and these proceedings are instituted against the defendants named herein under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 309, as amended (16 U.S.C. Sec. 4), entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, in order to prevent and restrain continuing violations by the defendants, as hereinafter alleged, of Sections 1 and 2 of that Act (15 U.S.C. Secs. 1, 2).

2. The defendants Employing Lathers Association of Chicago and Vicinity, Local No. 74 of Wood, Wire and Metal Lathers International Union of Chicago, Illinois and Vicinity, Harry D. Follett, and Edward D. Chouinard, as hereinafter alleged, maintain
4 offices and transact business within the Eastern Division of the Northern District of Illinois and are found therein.

II

DEFENDANTS

3. The following are named as defendants herein:

(a) Employing Lathers Association of Chicago and Vicinity, a corporation organized and existing under the General Not-for-Profit Corporation Act of the State of Illinois. Said cor-

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poration, sometimes hereinafter referred to as the "Association," is a trade association whose membership consists of 16 lathing contractors doing business in the Chicago area. The Association transacts business in Chicago, Illinois, and its records are kept by its secretary at 3354 N. Long Ave, Chicago, Illinois. The Association, which was incorporated in 1945, is the successor to prior unincorporated associations of lathing contractors located in the Chicago area.

(b) Local No. 74 of the Wood, Wire and Metal Lathers International Union of Chicago, Illinois and Vicinity, sometimes hereinafter referred to as "Local 74." The said Local 74 is an unincorporated trade union or association of individuals chartered by and operating under the authority of the Wood, Wire and Metal Lathers International Union. Its membership is composed of approximately 700 journeymen lathers and apprentices, who perform practically all of the lathing work in the Chicago area. It has its place of business and offices at 205 W. Wacker Drive, Chicago, Illinois.

(c) Harry D. Follett, an individual residing at 1015 N. Lombard Avenue, Oak Park, Illinois. The said Harry D. Follett is a lathing contractor doing business in the Chicago area, has been president of the defendant Association from approximately January 1951 to the date of the filing of this complaint, and was vice-president of the defendant Association from approximately August 1945 to January 1951.

(d) Edward D. Chouinard, an individual residing at 8028 S. Luella Avenue, Chicago, Illinois. The said defendant Edward D. Chouinard is a lathing contractor, has been a member of the Association for many years, and has been a member of its Joint Board of Arbitration.

4. Whenever in this complaint it is alleged that any corporate defendant or unincorporated association did any act or thing, such allegation shall be deemed to mean that such act was done by the officers, employees, agents, or representatives of such corporate defendant or unincorporated association.

III

Co-conspirators

5. Numerous lathing contractors, including those who are members of the defendant Association, were co-conspirators in the combination and conspiracy hereinafter alleged.

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IV

DEFINITIONS

6. As used herein, the term "lathing contractor" means an independent entrepreneur engaged in the business of entering
6 into and performing so-called "subcontracts" for the lathing of buildings. Such subcontracts are normally made with plastering contractors. Lathing contractors customarily enter into contracts based upon the furnishing of labor and part of the lathing materials by the lathing contractor, and the furnishing of the remainder of the lathing materials by the plastering contractor. Lathing contractors function as managers and owners of businesses and employ journeymen and apprentice lathers to perform the lathing operations which precede the application of the coats of plaster.

7. As used herein, the term "Chicago area" means that area within the recognized jurisdiction of Local 74. Such area includes most of Cook County and portions of Du Page and Lake Counties, Illinois.

V

NATURE OF TRADE AND COMMERCE

8. In most building construction in the Chicago area, contracts for lathing and plastering operations are generally executed with plastering contractors, who agree therein to furnish the plastering and lathing materials and to have the same installed. In performing said contracts, the plastering contractors sell and distribute plastering and lathing materials, and perform themselves the plastering work. In most instances, the plastering contractor enters into a subcontract with a lathing contractor for the installation of lathing materials in the building, said lathing materials being furnished by the plastering contractor to the lathing contractor. The contract of the plastering contractor for the sale and installation of plastering and lathing materials is not performed until the lathing materials are installed by the lathing contractor. The installation of lathing materials by lathing contractors is essential to the performance of contracts by plastering contractors for the sale of said materials to general contractors or building owners.

7 9. There are approximately 36 lathing contractors in the Chicago area who are engaged in the business of performing lathing contracts for the installation of lathing materials in buildings. The dollar volume of the lathing contracts entered into by the lathing contractors in the Chicago area in 1951 amounted to more than $8,000,000.

10. Approximately 16 of the above referred to lathing contractors in the Chicago area are members of the defendant Association.

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The dollar volume of lathing contracts entered into by lathing contractors who are members of the defendant Association totaled in excess of $5,000,000 in 1951, or over 60% of the total amount of lathing contracting business in the Chicago area in that year.

11. The materials, herein referred to as lathing materials, used and installed by lathing contractors in the performance of lathing contracts, include gypsum lath, metal lath, cornerites, corner beads, channel irons, and tie-wire. A major part of all of said lathing materials used in the performance of lathing contracts in the Chicago area is produced in States other than State of Illinois, and is shipped in interstate commerce from said States into the Chicago area for sale and installation therein.

12. Customarily, the lathing materials installed by lathing contractors in the Chicago area are purchased from building material dealers in the area, who purchase said materials from out-of-State sources for resale to plastering contractors, who in turn deliver the same to lathing contractors for installation. Substantial quantities of said lathing materials are purchased from out-of-State sources by said building material dealers in response and pursuant to prior orders placed with said dealers by plastering contractors, and, upon receipt of said materials from said out-of-State sources, said materials are then delivered to the plastering contractors who ordered the same, and are then delivered by said plastering contractors to the lathing contractors for installation.

8 13. Substantial quantities of lathing materials purchased by plastering contractors in the Chicago area are obtained from building material dealers who have in turn secured said materials from out-of-State sources in order to meet the regular anticipated demand of said plastering contractors. Said lathing materials purchased by such dealers from out-of-State sources to meet the regular anticipated demands of said plastering contractors move in a continuous flow in interstate commerce from said out-of-State sources through the dealers and plastering contractors to the lathing contractors for installation.

14. Substantial quantities of lathing materials purchased by plastering contractors through building material dealers are obtained from manufacturers, dealers, or other sources outside the State of Illinois who ship directly to the job site or place of business of said contractors in the Chicago area for delivery to the lathing contractor for the performance of lathing contracting work. Said lathing materials so sold and installed in the Chicago area flow in a continuous, uninterrupted stream from the points of origin in States other than the State of Illinois to the job site for installation and use in buildings and other structures in the Chicago area.

15. Consumers of lathing materials ordinarily do not install said materials, and this service is customarily performed by lathing con-

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tractors, who employ and supervise skilled labor for this purpose. The service performed by lathing contractors in the Chicago area in the installation of lathing materials is an integral part of, and necessary to, the movement in interstate commerce of lathing materials which are manufactured in States other than the State of Illinois and which are distributed and installed in the Chicago area. Thus, lathing contractors are conduits through which lathing materials manufactured and shipped from States other than the State of Illinois are applied to their intended use in the construction of buildings in the Chicago area. The function performed by said lathing contractors in the installation of said lathing materials in buildings is essential to the interstate flow of said materials, since said lathing materials are of no use to the ultimate purchaser until they are installed in buildings. Said lathing materials flow in a continuous stream from their points of origin in States other than Illinois to their final installation and use in buildings in the Chicago area.

16. The lathing operation is an integral part of the building construction industry, which, in the Chicago area in 1951, engaged in new building construction and remodeling to the value of approximately a half billion dollars, and the performance of said lathing operation is necessary to the completion of other building operations, including plastering and interior painting and decoration, and the installation of plumbing fixtures, heating and air conditioning outlets and vents, electrical outlets and fixtures, flooring and interior wood trim, and window and door sashes. A substantial part of all of said building materials and appurtenances is produced in States other than Illinois and is sold and shipped in interstate commerce from said States to the Chicago area for distribution and use in buildings in said area.

17. The installation or use in buildings of said building materials and appurtenances is an integral part of, and necessary to, the movement in interstate commerce of said materials manufactured in States other than the State of Illinois and which are distributed, sold and installed in the Chicago area. Substantial quantities of said building materials and appurtenances flow in a continuous uninterrupted stream from their points of origin in States other than Illinois to the places of installation and use in buildings in the Chicago area.

18. Any restraint upon or disruption in or interference with the performance of lathing work in the Chicago area necessarily and directly restrains and affects the interstate flow of lathing materials, and also constitutes a direct and substantial burden and restraint upon the interstate flow of all of the hereinbefore referred to building materials and appurtenances entering into the construction of buildings in the Chicago area.

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VI

THE COMBINATION AND CONSPIRACY

19. For many years past, the exact beginning date to the plaintiff unknown, and continuing to the date of the filing of this complaint, the defendants and their co-conspirators, and others to the plaintiff unknown, have engaged in an unlawful combination and conspiracy to suppress competition among the lathing contractors in the Chicago area, and to restrict and exclude persons from engaging in the lathing contracting business in said area, in unreasonable restraint of the hereinbefore described trade and commerce among the several States, and to monopolize the installation in the Chicago area of lathing materials flowing in interstate commerce as hereinbefore described, in violation of Sections 1 and 2 of the Act of Congress of July 2, 1890 (15 U.S.C. Secs. 1, 2), commonly known as the Sherman Act. Said offenses are continuing and will continue unless the relief hereinafter prayed for in this complaint is granted.

20. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among the defendants, the co-conspirators, and others to the plaintiff unknown, the substantial terms of which have been and are that they agree:

(a) To restrict and reduce the number of lathing contractors permitted to engage in the lathing contracting business by:

(1) Excluding any person from becoming a lathing contractor who has not first secured the approval of Local 74;

(2) Denying the right to become a lathing contractor to any person who has not first been a member of Local 74 for five years;

(3) Denying to any person, who has not first obtained the approval of Local 74 to become a lathing contractor, the right to employ members of Local 74;

11 (4) Restricting and reducing, by arbitrary racial and family relationship standards, the number of apprentice and journeymen lathers accepted into membership in Local 74;

(b) To assign particular plastering contractors to certain designated lathing contractors, thereby eliminating the competition among lathing contractors for the business of said plastering contractors, and depriving said plastering contractors of their right to choose the lathing contractors with whom they wish to do business;

(c) That the defendants eliminate competition in the lathing field between lathing contractors and plastering contractors by freezing and reducing the number of plastering contractors who are permitted to hire members of Local 74;

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(d) That the defendant Association and co-conspirators effectuate payments of money to officers of defendant Local 74 to induce them to utilize the power of that Local in furtherance of the conspiracy.

21. During the period of time covered by this complaint and for the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and their co-conspirators by agreement and concert of action, have done the things which, as hereinbefore alleged, they conspired to do, and more particularly have done, among others, the following acts and things.

22. In furtherance of the conspiracy to restrict competition in the lathing field, the defendant Local 74 has adopted, maintained, and enforced restrictions governing entry into the lathing contracting business in the Chicago area. Thus, Local 74 requires persons desiring to enter the lathing contracting business first to make application to and receive the approval of Local 74 as a prerequisite to entering the business. Persons who have failed to receive the approval of Local 74 have been denied the right to hire
12 Local 74 journeymen lathers and apprentices, and thereby have been excluded from the lathing contracting business in the Chicago area. Local 74 further refuses to consider or approve applications except from persons who have been journeymen members of Local 74 for five years. As a result, no person who has not been a journeyman member of Local 74 is permitted to engage in the lathing contracting business in the Chicago area.

23. Prior to the beginning of this conspiracy, a number of plastering contractors in the Chicago area hired journeymen lathers who were members of Local 74 to perform lathing work rather than subcontract such work to lathing contractors. With the inception of this conspiracy, and in furtherance of it, the defendant Local 74 instituted the practice of refusing to permit additional plastering contractors to hire journeymen lathers. As a result of this practice, there has been a reduction in the number of plastering contractors permitted to hire lathers directly, and at the present time there are only seven union plastering contractors in the Chicago area out of approximately 140 who may thus hire journeymen lathers directly. The remainder must subcontract their lathing to lathing contractors.

24. To encourage Local 74 to effectuate the restriction and reduction of competition in the lathing contracting business, the defendant Association has from time to time paid sums of money to officers of Local 74. The Association made seventy-five per cent of its dues available for such payments, and designated its Promotion Manager to pay sums of money and other considerations to officers and business agents of Local 74. The Association furthermore employs the President of Local 74 at a substantial salary

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to act as Managing Director of a foundation which has been established and is financed by Chicago area lathing contractors for the purported purpose of promoting the lathing industry.

25. Pursuant to the conspiracy charged herein, Local 74 has adopted and maintained restrictive membership rules and policies which curtail the number of persons eligible to become
13 members of Local 74 and to qualify as lathing contractors. Thus, it restricts admission of apprentices into membership into Local 74 to those persons who are relatives of journeymen lathers who are already members of Local 74. It has also arbitrarily excluded applicants of the negro race from becoming apprentices or from being admitted to membership as journeymen lathers. Local 74 has also refused to accept into membership journeymen lathers of the negro race who have attempted to transfer memberships to Local 74 from out-of-State lathers' unions affiliated with the same International Lathers Union with which Local 74 is affiliated.

26. For many years each lathing contractor registered with Local 74 the plastering contractor or contractors for whom such lathing contractor performed lathing subcontracts. Upon such registration, it was understood by all other lathing contractors that the registered plastering contractors were "assigned" to the lathing contractor who had registered their names. Thereafter, all other lathing contractors in the Chicago area refrained from soliciting the business of such "assigned" plastering contractors and refrained from submitting bids to, or performing lathing work for, such assigned plastering contractor. The operation of the above described "assignment" plan resulted in each plastering contractor in the Chicago area being confined to one lathing contractor and being denied the right to obtain competitive bids from two or more lathing contractors. Furthermore, each plastering contractor was prohibited from entering into subcontracts with more than one lathing contractor.

27. Under the operation of the foregoing registration system, whenever a plastering contractor sought to change its lathing subcontractor, such plastering contractor had first to make application to, and receive the approval of, defendant Local 74. In many instances, Local 74 denied to such dissatisfied plastering contractors the right to change lathing subcontractors. As a result of such plan of "registration" and "assignment," competition among
14 lathing contractors was suppressed and plastering contractors were denied the right to enter freely into business arrangements with lathing contractors of their choice.

28. Operation of the above described plan of "assignment" caused dissatisfaction among plastering contractors and constituted one of the issues in dispute between plastering contractors and

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Local 74 during the fall of 1950. As a result of this dispute, Local 74 entered into an agreement with the plastering contractors recognizing the right of such plastering contractors to obtain bids from more than one lathing contractor and to contract for lathing work with more than one lathing contractor. Shortly thereafter, however, the defendants reached a mutual understanding whereby the so-called "registration" and "assignment" plan was to be continued under the sponsorship of the defendant Association rather than of Local 74. Thus, the members of the Association agreed not to solicit or perform lathing contracts for a plastering contractor who had been "registered" with the defendant Association by another lathing contractor as his "recognized" account, unless such other lathing contractor consented to such competition. Each member of the defendant Association agreed to "register" with the Secretary of the Association the names of those plastering contractors "claimed" by such lathing contractor as his accounts.

VII

Effects of the Conspiracy

29. The effects of the aforesaid combination and conspiracy, among others, have been as follows:

(a) The number of lathing contractors in the Chicago area has been reduced from approximately 95 in 1925 to approximately 36 at the present time and the right of union contractors to hire union journeymen lathers and apprentices has been unlawfully restrained and impeded;

(b) Competition among lathing contractors in the Chicago area has been unlawfully restrained and the traditional American right of a person to enter into a business of his own choice without hindrance of illegal restraints of trade has been impaired and thwarted;

(c) The cost of building construction in the Chicago area has been artificially and illegally increased;

(d) The public has been denied the benefits in the construction industry in the Chicago area which would result from competition free from the illegal restraints in the lathing phases of the building construction industry;

(e) Interstate trade and commerce in lathing and related building materials has been unlawfully restrained.

Prayer

Wherefore, plaintiff prays:

1. That the Court adjudge and decree that the aforesaid combination and conspiracy entered into by the defendants and all the

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acts done pursuant thereto constitute an unlawful restraint of interstate trade and commerce in violation of Sections 1 and 2 of the Sherman Act.

2. That the defendants, and each of them, and their directors, officers, and agents, and employees, be enjoined from continuing, renewing, or reviving the unlawful combination and conspiracy hereinbefore alleged, or any combination or conspiracy having a similar purpose or effect.

3. That defendants and each of them be enjoined from requiring persons desiring to enter the lathing contracting business to apply to and secure the approval of Local 74 and that Local 74 be enjoined from adopting or maintaining any policy, rule, or by-law having the purpose or effect of preventing or restricting any prospective lathing contractor from entering such business;
16 provided, however, that nothing in the judgment entered in this cause shall prevent or prohibit Local 74 from requiring persons who wish to employ Local 74 members to agree to abide by union contract requirements as to wages, hours of employment, and other legitimate terms of working conditions.

4. That the defendant Local 74 be enjoined from adopting, maintaining, or enforcing any rule or restriction having the purpose or effect of preventing or restricting members of Local 74 from engaging in the lathing contracting business.

5. That Local 74 be enjoined from prohibiting, restricting, or preventing any person, including but not limited to any plastering contractor, from employing or hiring members of Local 74 to perform lathing work so long as such person will agree to abide by union contract requirements as to wages, hours of employment, and other legitimate terms of working conditions.

6. That Local 74 be enjoined from continuing, establishing, or maintaining any policy, rule, or requirement relating to admission of journeymen or apprentices into membership in Local 74 which is based upon race, religion, national origin, or family relationship to an existing member of the Local and which may have the effect of limiting the number of those eligible to enter the lathing contracting business.

7. That the defendants, and each of them, be enjoined from establishing, continuing, maintaining, fostering, or participating in any plan, program, or understanding to allocate, register, or "assign" plastering contractors or lathing jobs to particular lathing contractors.

8. That the Court enter such orders with respect to the rules, by-laws, and charter of the defendant Association and of the defendant Local 74 as is necessary to prevent the restrictive practices herein alleged and to carry out and enforce the terms of the judgment entered in this cause.

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17-18 9. That the plaintiff have such other, further, and different relief as the nature of the case may require and the Court may deem appropriate in the premises.

10. That the plaintiff recover the costs of this suit.

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19-20 IN UNITED STATES DISTRICT COURT

[Title omitted]

JOINT AND SEVERAL MOTION OF CERTAIN DEFENDANTS TO DISMISS COMPLAINT—Filed October 21, 1952

Defendants Employing Lathers Association of Chicago and Vicinity, Harry D. Follett and Edward D. Chouinard, by their attorneys, jointly and severally move the Court to dismiss the Complaint herein for failure to state a claim upon which relief can be granted, on the grounds that:

1. The commerce alleged to be restrained is intrastate commerce only, and interstate commerce is not shown by the facts alleged to have been directly or substantially affected by the conduct charged to defendants, nor intended by defendants to be so affected;

2. The facts alleged in the Complaint do not constitute unreasonable restraints of, or agreements to restrain unreasonably, an appreciable segment of commerce;

3. The facts alleged in the Complaint do not constitute monopol-

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ization, or a combination or conspiracy to monopolize, any part of trade or commerce among the several States.

HOLLAND F. FLAHAVHAN,
LEO F. TIERNEY,
CHARLES L. STEWART, JR.,
Attorneys for Defendants Employing Lathers Association of Chicago and Vicinity, HARRY D. FOLLETT *and* EDWARD D. CHOUINARD.

21 IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS COMPLAINT—Filed October 21, 1952

Now comes the Defendant, Local No. 74 of Wood, Wire and Metal Lathers International Union of Chicago, Illinois and Vicinity, by its attorneys, Nathan M. Cohen and Asher, Gubbins and Segall, and pursuant to Rule 12 (b) of the Federal Rules of Civil Procedure, moves to dismiss the complaint herein for the reason that said complaint fails to state a claim upon which relief can be granted.

The complaint herein fails to state a cause of action under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended (15 U.S.C. Section 4), commonly known as the Sherman Act. Defendant, Local No. 74, contends said complaint fails to allege any act on the part of said Local No. 74 in violation of Sections 1 and 2 of said Sherman Act (15 U.S.C. Sections 1 and 2) for the following reasons:

1. The complaint fails to allege that the Defendant, Local No. 74, has committed any act in violation of any law of the United States and specifically fails to allege that the Defendant, Local No.
22 74, has committed any act in violation of Section 1 of the Act of Congress of July 2, 1890 (15 U.S.C. Sec. 1) commonly known as the Sherman Act.

2. The complaint fails to allege that the Defendant, Local No. 74, has committed any act which constitutes engaging in an unlawful combination and conspiracy in violation of Section 2 of the Act of Congress of July 2, 1890, as amended (15 U.S.C. Sec. 2), commonly known as the Sherman Act.

3. The complaint fails to allege that Local No. 74 has engaged in any act which has a necessary tendency to cause direct and undue restraint of competition in intersate commerce.

4. The complaint fails to allege that Local No. 74 has committed any act whatsoever which directly or indirectly affects production,

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prices, or the maintenance of trade of any commodity flowing in interstate commerce.

5. The complaint fails to allege any act committed by any of the co-Defendants named herein which constitutes an unlawful combination and conspiracy to affect the production, price, or purchase of any commodity flowing in interstate commerce.

6. Section 6 of the Act of October 15, 1914, Chapter 23, 38 Stat. 731 (15 U.S.C. Sec. 17) eliminates the possibility of any violation of Sections 1 and 2 of the Sherman Act cited above by the Defendant, Local No. 74 based upon the facts alleged in the complaint herein.

23-24 7. No act is alleged in the complaint to have been committed by Local No. 74 or any other of the named defendants which has resulted in eliminating or curbing price competition with respect to any article or commodity whatsoever sold in interstate commerce.

WHEREFORE, Defendant, Local No. 74, prays that this Honorable Court dismiss all of the counts of the complaint herein in which said Local No. 74 is named as a Defendant.

*—— ——,

---

* Note: Original not signed.

Attorneys for Local No. 74, one of the Defendants herein.

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25 IN THE UNITED STATES DISTRICT COURT

Civil Action

No. 53 C 125

JOSEPH HOWARD, et al., Plaintiffs,

vs.

LOCAL 74, WOOD WIRE AND METAL LATHERS INTERNATIONAL UNION, et al., Defendants.

Civil Action

No. 52 C 1639

UNITED STATES OF AMERICA, Plaintiff,

vs.

EMPLOYING LATHERS ASSOCIATION OF CHICAGO AND VICINITY; et al., Defendants.

No. 52 CR 331

THE UNITED STATES

vs.

EMPLOYING LATHERS ASSOCIATION OF CHICAGO AND VICINITY; et al., Defendants.

Civil Action

No. 52 C 1640

UNITED STATES OF AMERICA Plaintiff,

vs.

EMPLOYING PLASTERERS ASSOCIATION OF CHICAGO; et al., Defendants.

No. 52 CR 332

THE UNITED STATES

vs.

EMPLOYING PLASTERERS ASSOCIATION OF CHICAGO; et al., Defendants.

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26 TRANSCRIPT OF PROCEEDINGS ON RULING ON MOTIONS TO DISMISS

Before HON. J. SAM PERRY, one of the judges of said court, in his courtroom in the United States Court House, Chicago, Illinois, on Monday, July 13, 1953.

By THE CLERK: 53 C 125, Howard et al. vs. Local 74, etc.;
52 C 1639, United States vs. Employing Lathers Association of Chicago, etc.;
52 CR 331, United States vs. Employing Lathers Association, etc.;
52 C 1640, United States vs. Employing Plasterers Association of Chicago, et al.;
52 CR 332, United States vs. Employing Plasterers Association of Chicago, et al.
Ruling on motions to dismiss.

27 THE COURT: Gentlemen, this case has given me a great deal of concern. I have devoted a great deal of time to it.

Of course, for the purposes of this motion only, all of the allegations stand admitted. I say that cautiously, for the purpose of this motion only. When I come to rule I must take it as presumed that every well pleaded fact is true, in order for me to rule upon this motion, and I take it that it is true that there are the racial discriminations, for the purpose of this motion; I take it that it is true that there are the other restrictions, the five-year restriction about journeymen, and the other agreements. On that basis I have arrived at a conclusion. In the beginning I may point out that it is alleged there are 36 lathing contractors in the Chicago area, that about $8,000,000 worth of business was done in the year 1951, and that approximately 16 of said 36 contractors are members of the defendant association, and that they did about

28 $5,000,000 of the $8,000,000 worth of work. In other words, they did 60 per cent, which is a very substantial part of the total amount of the lathing. I am referring now to the lathing situation. From my point of view it would not make any difference if they did 100 per cent of it, as I view the law.

I will review the heart of the indictment very briefly, referring now only to the lathing indictment, for what goes as to the lathing indictment will go for the other also, for the plasterers. The indictment alleges that customarily lathing materials installed by lathing contractors in the Chicago area are purchased from building material dealers in the Chicago area who purchase said material from out-of-state concerns for resale to said plastering contractors who in turn deliver the same to lathing contractors for installation. I am taking the Chicago area to mean the State of Illinois. As far

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as I can find, there is nothing in the allegations that indicates anything else than that when they speak of the Chicago area the reference is to Chicago, Cook County, DuPage County, Lake County, the whole thing in this particular area here, and
29 not crossing over any state lines. After alleging the aforesaid facts, which I am not repeating but which were in the allegations, the indictment charges that substantial quantities of lathing material are purchased from out-of-state sources by building material dealers in response to and pursuant to prior orders placed with said dealers by plastering contractors, and which building material is subsequently delivered to the plastering contractors and redelivered to the lathing contractors for installation.

The indictment then charges that substantial quantities of lathing material are purchased by plastering contractors for building materials, who have in turn secured said building materials from out-of-state sources in order to meet regularly anticipated demands of plastering contractors. In other words, the first allegation there is that the plastering contractors order materials from building materialmen and that the building materialmen themselves buy it out of state and it is shipped apparently to them, and then after it has arrived in the Chicago area it is sold to the plastering contractors who then furnish it to the lathing contractors.

30 The second one is the same thing, except that when they place the order they get it right quickly because they have already stockpiled.

There is a third phase of the indictment. The indictment further charges that substantial quantities of building material purchased by plastering contractors through building material dealers are obtained from manufacturers and dealers and other sources outside of the State of Illinois, who ship directly to the job site or place of business of said contractors in the Chicago area for delivery to the lathing contractors. The only difference between that and the first one is that in place of the delivery going to the building contractor, the material contractor simply sends it straight to the job as a matter of convenience. There is not anything there I can see, any allegation, that the plastering contractor buys that from out-of-state himself. If he did, if there were such an allegation and if that were the fact, then we would have to go to trial on the issues, because there would then be involved commodities passing in interstate commerce. But that is not the situa-
31 tion as I see it here.

There is no allegation of any effect of that intrastate conspiracy upon the interstate market price of the building material involved. I might add, so far as I can see there is no allegation of any discrimination or anything that would cause a man to buy his building material in Wisconsin or in Chicago or in California,

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no restraint that I can find in the allegation. There is no allegation of fact of its effect upon the flow of materials into the State of Illinois. We are dealing here with a local restraint and monopoly of local labor, and when I say local I mean Illinois, restraint right here in Illinois, restraint upon local labor service, Illinois service. They do not become associated with the building material until after the building materials have been purchased and have come to a state of rest in the State of Illinois.

To make that perhaps a little clearer, it looks to me, as I view it, that whatever restraint there is takes place after all the buying and selling is done, the water line is complete and the water is being sprayed out, so to speak, and they are picking it up in buckets and doing what they are doing with it, but they are not cutting
32 the line above. That is the way I look at it, and I cannot see where the Sherman Act was intended by Congress to interfere with local affairs even though they might be malicious, even though they might be economically unsound, even though they might be unfair and even though they might be illegal. For all I know, some of the actions might violate the Taft-Hartley Act; for all I know some of them might violate the Civil Rights Act. But I am not interpreting the Civil Rights Act. This indictment is brought specifically and is limited to and deals only with the Sherman Act. It is purely conjectural that this practice may remotely and indirectly affect the flow of commerce. It might do it. It might be that it has reduced the number of buildings that are built in this area, it might be it has driven building elsewhere, it might be that it has driven an industry elsewhere, but that is not alleged in the indictment and it would be purely conjectural anyway in my judgment.

There is no allegation showing these defendants intended to burden interstate commerce by this alleged conspiracy. There is no
33 showing that they intended to burden interstate commerce, and there is no allegation of fact that it does, and, to put it frankly, if this were a situation where houses were being built, and there were the one additional allegation that after the houses were built, instead of being attached to the real estate and becoming part and parcel of the local community, that they were put on box cars and sent to Indiana or Wisconsin, if some of the materials had come from there, or to California or any other state in the nation, then you would have interference with interstate commerce that would come under the Sherman Act and you would then have these interferences entering into and affecting the actual price of the commodity as it goes from here elsewhere, and that might very well be a restraint of trade such as would come under the Sherman Act.

In the light of the authorities and the view this Court has taken of the indictments, the complaints do not state a cause of action

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under the anti-trust laws. I cannot bring myself to extend the law, as a mere District court. I cannot extend the law by interpretation, because if I did extend it in this case then we would have the
34 law covering every step from the beginning of manufacture to the final consumption, and each and every act of every kind would come under the Sherman Act. In my judgment that would not be within the intention of the Congress. If Congress wishes this Act extended it has the authority under the commerce clause in all likelihood to do so. It may be that the Supreme Court might see this matter otherwise than I do, but it certainly is a matter for the Supreme Court to interpret.

For me to take the time of this Court and to take the time of the Government and the defendants in many weeks of testimony when in my sincere judgment the indictment does not state a cause of action would not be fair to the Government, to the parties, to the Court and to the litigants. It would be a waste of time and effort to so do.

Under the law such an action as this, being dismissed, can go straight to the Supreme Court which can pass directly upon the question of how far this may be extended.

Therefore, counsel will prepare the proper orders for dismissal in accordance with their desires in this case. While I have
35 been discussing primarily the lathing case the same motion will be entered in each of the other cases. That is the order of the court.

Mr. TIERNEY: As to the individual defendants named in the indictments, if they are under bond they will be discharged?

The COURT: Absolutely. Prepare the proper orders.

Mr. MCCLASKEY: My name is William McClaskey, from Moore & Leighton, representing the plaintiff Joseph Howard.

The first motion to be called this morning was for leave to the plaintiff Joseph Howard to file an amended complaint in 30 days from the date hereof.

The COURT: I did not have that called.

The CLERK: I did not call it, Judge.

The COURT: I only ruled on the motion.

Mr. MCCLASKEY: I beg your pardon. I understood——

The COURT: I will take a short recess for a minute, and then you may call that.

Mr. MCCLASKEY: Will that affect the parties here, in regard to this motion?

The COURT: As far as that motion to amend the complaint
36 is concerned, I would think that if you have a complaint on some other statute you should bring it under another statute and not seek to come in under this statute, because these other cases will be dismissed.

Mr. McCLASKEY: This is a motion to quash and, as I understand the ruling, your Honor's matter was a set matter.

The COURT: That is right.

Mr. McCLASKEY: I understood the motion of course should be called first.

The COURT: But if your case is dismissed on the set call what purpose would there be in calling a motion of course? Does your amendment purport to amend the complaint still under this particular Act?

Mr. McCLASKEY: That is my understanding. I came here for the plaintiff, for the attorneys for the plaintiff, Joseph Howard.

The COURT: Well, I don't see any point in granting you leave to file an amended complaint when I have just dismissed the whole suit here on the basis that I have arrived at. We would just be going over the same thing all over. I think the motion will be denied.

37-38 Mr. McCLASKEY: Motion denied?

The COURT: Then if you have other grounds or other statutes under which you wish to proceed I think it would be safer to file a separate, a completely new suit.

Motion denied.

Reporter's Certificate to foregoing transcript omitted in printing.

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39 In United States District Court, Northern District of Illinois, Eastern Division

Civil Action No. 53 C 125

JOSEPH HOWARD, BERNARD HOWARD and PAUL HUGH, on their behalf and on behalf of all those persons similarly situated, PLAINTIFFS

vs.

LOCAL 74 of the WOOD, WIRE AND METAL LATHERS, INTERNATIONAL UNION OF CHICAGO, ILLINOIS AND VICINITY; ELMER LINDSAY, Personally and as President of Local 74; WILLIAM EBY, Personally and as Financial Secretary-Treasurer of Local 74; WOOD WIRE AND METAL LATHERS INTERNATIONAL UNION, A. F. OF L.; WILLIAM MCSORELY, Personally and as General President of Wood, Wire and Metal Lathers A. F. of L.; EMPLOYING LATHERS ASSOCIATION OF CHICAGO AND VICINITY, an Illinois corporation; HARVEY D. FOLLETT; EDWARD D. CHOUINARD, DEFENDANTS

Criminal Action No. 52 CR 331

UNITED STATES OF AMERICA, PLAINTIFF

vs.

EMPLOYING LATHERS ASSOCIATION OF CHICAGO AND VICINITY; LOCAL NO. 74 OF WOOD, WIRE AND METAL LATHERS INTERNATIONAL UNION OF CHICAGO, ILLINOIS AND VICINITY; HARRY D. FOLLETT; AND EDWARD D. CHOUINARD, DEFENDANTS

Civil Action 52 C 1639

UNITED STATES OF AMERICA, PLAINTIFF

vs.

EMPLOYING LATHERS ASSOCIATION OF CHICAGO AND VICINITY; ET AL., DEFENDANTS

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40 Criminal Action No. 52 CR 332

UNITED STATES OF AMERICA, PLAINTIFF

vs.

EMPLOYING PLASTERERS ASSOCIATION OF CHICAGO; JOURNEYMEN PLASTERERS' PROTECTIVE AND BENEVOLENT SOCIETY, LOCAL NO. 5, O. P. & C. F. I. A.; and BYRON WILLIAM DALTON, DEFENDANTS

Civil Action No. 52 C 1640

UNITED STATES OF AMERICA, PLAINTIFF

vs.

EMPLOYING PLASTERERS ASSOCIATION OF CHICAGO; ET AL., DEFENDANTS

MEMORANDUM—Filed July 20, 1953

All five causes under consideration present similar operations in the building trades of the Chicago area which operations are alleged to violate the Sherman Act. A summary analysis of the operations and business practice of the lathing industry can serve to present the operations of the plastering industry because they are similar. Since the legal question in both trades is identical, this discussion relative to the lathing industry is equally applicable to the plastering trade and one opinion will serve for all of the cases at bar.

The defendants, the Employing Lathers Association of Chicago and the labor union known as Local No. 74 of the Wood, Wire and Metal Lathers and its officers, Harry D. Follett and Edward D. Chouinard, were indicted in the case at bar for violation of Sections One and Two of the Sherman Act. All of the de-
41 fendants were residents of the State of Illinois and conducted and carried on their business in the State of Illinois and the acts of conspiracies charged against them were all performed in the State of Illinois.

The indictment charges that there are thirty-six lathing contractors in the Chicago area, an area consisting of the counties of Cook, Du Page and Lake, all three of which are Illinois Counties. All thirty-six of these contractors did about Eight Million Dollars worth of business in 1951. Sixteen of these lathing contractors, who were members of the defendant Employing Lathers Association of Chicago, did about Five Million Dollars worth of work in 1951

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in the said three Illinois counties, which amounted to about sixty per cent of all of the lathing business in those counties.

The indictment charged that generally contracts for lathing are executed by building contractors with plastering contractors who agree, under the terms of such contracts, to deliver lathing material and furnish labor for the lathing work required by the building contractor. The plastering contractor then enters into a sub-contract with the lathing contractor for the installation of lathing material in the building being constructed and said lathing material is furnished to said sub-contractors by the plastering contractor.

A major part of all lathing material used in lathing contracts in the said three Illinois counties is sold by manufacturers and dealers from other states to local material dealers in Illinois for resale in Illinois. They, in turn, sell said lathing materials to plastering contractors in Illinois, who then use such materials, or cause lathing contractors to use them, in constructing the
42 work on buildings in Illinois, which buildings remain in Illinois and do not again enter into the stream of inter-state commerce.

There are three methods of delivery used by the building material suppliers who live and conduct their business in Illinois. Those methods are as follows:

FIRST: a substantial amount of lathing materials is purchased from out-of-State sources by building material dealers in response and pursuant to prior orders placed with said dealers by plastering contractors, which is subsequently delivered to the plastering contractors and redelivered to the lathing contractors for installation.

SECOND: A substantial amount of lathing materials is purchased by plastering contractors from building material dealers in Illinois, who have, in turn, secured said material from out-of-State sources in order to meet regular, anticipated demands of plastering contractors. In other words, the purchase is made from building material dealers who stock pile plastering material.

THIRD: A substantial amount of lathing materials is purchased by plastering contractors from building material dealers who order the same from manufacturers and dealers and other sources outside of the State of Illinois, who, in turn, ship the same directly to the job site or place of business of said contractors in the said three Illinois counties for delivery to the lathing contractors for performance of lathing contracting work in said three Illinois counties, commonly known as the Chicago area. It is charged that said lathing materials, so sold, and installed in Illinois, flow in a continuous and uninterrupted stream from the points of origin in states other than the State of Illinois, to the job site for
43 installation and use in the buildings and other structures in Illinois.

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For the purpose of ruling upon this motion before the Court, all of the allegations stand admitted and every well pleaded fact is assumed to be true.

The plastering contractor is not charged with buying from out-of-State dealers but from building material dealers in Illinois, who are not named in the indictments or complaints herein.

The indictment alleges the existence of an agreement between the Association and Local 74, whereby lathing contractors are excluded from engaging in the area trade, unless they are first approved by Local 74. Such approval is dependent upon a five year union membership, which, in turn, is restricted and reduced pursuant to arbitrary racial and family relationship standards. Disapproved contractors cannot employ union lathers; approved lathing contractors are assigned to designated plastering contractors. It is alleged that this practice has suppressed competition among the lathing contractors in the area, and has effected a monopoly among the few approved lathing contractors, and that it is an unreasonable restraint upon trade and commerce.

There is no allegation of any effect of the alleged intrastate conspiracy upon the interstate market price of the building material involved. There is no allegation of any discrimination or anything that would cause a purchaser to buy building material in Wisconsin or in Chicago or in California. There is no allegation of fact of its effect upon the flow of materials into the State of Illinois. This is wholly a charge of local restraint and monopoly by local labor and a local lathers association, all confined to three counties
44 in the State of Illinois. The alleged restraints do not become associated with the building material or ultimate cost of buildings until after the building materials have been purchased and have come to a state of rest in the State of Illinois, so far as the stream of interstate commerce is concerned.

Whatever restraint there is occurs after all the buying and selling is completed. The flow of commerce is not unlike the flow of water and the statute is designed to prevent a break in the pipes through which interstate commerce flows across state lines and to the consumer. The statute is not designed to apply to the use the consumer makes of the articles of commerce after the consumer has completed his purchase, unless the consumer creates a new product and a new stream of commerce that again crosses state boundary lines.

The Sherman Act was not intended by Congress to interfere with local affairs, even though they might be unfair and malicious and economically unsound. This indictment is brought specifically and is limited to and deals only with the Sherman Act. It is purely conjectural whether the practice with which the defendants are charged may remotely and indirectly affect the flow of commerce.

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It might be that it has reduced the number of buildings that are built in three counties in Illinois; it might be it has driven building and industry elsewhere; but that is not alleged in the indictment.

There is no allegation showing these defendants intended to burden interstate commerce by this alleged conspiracy. There is no allegation of fact that it does so burden interstate commerce.

45-46 If this were a situation where portable houses were being built, and there was an additional allegation that after the houses were built, instead of being attached to the real estate and becoming part and parcel of the local Illinois community, where all the acts are alleged to have been committed; and instead of being affixed to real estate remaining in Illinois they were loaded on box cars and sent to other states then there would be such interference with interstate commerce as would support these indictments and complaints herein.

In the light of the authorities, it is the view of this Court indictments and complaints herein do not state an offense or cause of action under the anti-trust laws.

This Court cannot extend the law by interpretation, because, if this Court did extend it in this case, then every step in commerce from the beginning of manufacture to and including the final consumption, and each and every act of every kind thereafter that might affect the quantity or price of articles of commerce would come under the Sherman Act. This Court is bound by the language of the Sherman Act and its subsequent judicial interpretations. It would be presumptuous of a District Court to extend the statute in question to cover the facts alleged in the instant indictment by breaking a new path into the wilderness of commerce law, when the higher Courts have already circumscribed pathways that clearly indicate that the jurisdiction of this Court over interstate commerce ends at the same time and place where interstate commerce itself ends.

Appropriate orders in accord with this opinion will be entered in each case forthwith.

J. S. PERRY,
Judge.

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47-48 In United States District Court, Northern District of Illinois, Eastern Division

Civil Action 52 C 1639

UNITED STATES OF AMERICA, PLAINTIFF

v.

EMPLOYING LATHERS ASSOCIATION OF CHICAGO AND VICINITY; LOCAL NO. 74 OF WOOD, WIRE AND METAL LATHERS INTERNATIONAL UNION OF CHICAGO, ILLINOIS AND VICINITY; HARRY D. FOLLETT; AND EDWARD D. CHOUINARD, DEFENDANTS

ORDER DISMISSING COMPLAINT—July 20, 1953

This cause came on to be heard upon the motions of all defendants herein, through their respective attorneys, to dismiss the complaint herein for failure to state a claim upon which relief can be granted under the Sherman Anti-Trust Laws. The Court has examined and considered the pleadings and briefs of counsel, filed in this cause. The contention of all defendants that the complaint fails to state a claim upon which relief can be granted under the Sherman Anti-Trust Laws has been considered and sustained.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the complaint herein be dismissed as to all defendants.

ENTER:

J. S. PERRY,
Judge.

July 20, 1953.

49-50 In United States District Court

[Title omitted]

PETITION FOR APPEAL—Filed September 18, 1953

The United States of America, plaintiff in the above-entitled cause, considering itself aggrieved by the final decree of this Court entered on the twentieth day of July, 1953, does hereby pray an appeal from said final decree to the Supreme Court of the United States. Pursuant to Rule 12 of the Rules of the Supreme Court, the plaintiff presents to this Court herewith a statement showing the basis of jurisdiction of the Supreme Court to entertain an appeal in this cause.

The particulars wherein the plaintiff considers the order erroneous are set forth in the assignment of errors and prayer for reversal accompanying this petition and to which reference is hereby made.

The plaintiff prays that its appeal may be allowed and that cita-

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tion be issued as provided by law, and that a transcript of the record, proceedings, and documents upon which said final decree was based, duly authenticated, be sent to the Supreme Court of the United States under the rules of said Court in such cases made and provided.

STANLEY N. BARNES,
Assistant Attorney General.
EARL A. JINKINSON,
Special Assistant to the Attorney General.

Dated this 18th day of September, 1953.

51-54 In United States District Court

[Title omitted]

ORDER ALLOWING APPEAL—September 18, 1953

In the above-entitled cause, the United States of America, plaintiff, having made and filed its petition praying an appeal to the Supreme Court of the United States from the final decree of this Court in this cause entered on the twentieth day of July, 1953, and having also made and filed its petition for appeal, assignment of errors and prayed for reversal, and statement of jurisdiction, and having in all respects conformed to the statutes and rules in such cases made and provided,

IT IS THEREFORE ORDERED AND ADJUDGED

That the appeal be and the same is hereby allowed as prayed for.

J. S. PERRY,
United States District Judge.

Dated this 18th day of September, 1953.

55 In United States District Court

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed September 18, 1953

The United States of America, plaintiff in the above-entitled cause, in connection with its petition for appeal to the Supreme Court of the United States, hereby assigns error to the record and proceedings and the entry of the final judgment of the district court on July 20, 1953, in the above-entitled cause, and says that in the entry of the final judgment the district court committed error to the prejudice of the plaintiff in the following particulars:

1. The court erred in holding that the allegations of the complaint do not show a restraint or monopolization of interstate commerce.

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2. The court erred in holding that, under the allegations of the complaint, the conspiracy to restrain and monopolize which is set forth operated only upon commerce which is intrastate.

3. The court erred in adjudging that the complaint fails to state a claim upon which relief can be granted.

4. The court erred in entering judgment dismissing the complaint.

Wherefore, plaintiff prays that the final judgment of the district court may be reversed to the extent that it is inconsistent
56-92 with the errors herein assigned by the plaintiff, and for such other and fit relief as to the court may seem just and proper.

STANLEY N. BARNES,
Assistant Attorney General.
EARL A. JINKINSON,
Special Assistant to the Attorney General.

Dated this 18th day of September, 1953.

93-97 STATEMENT CALLING ATTENTION TO THE PROVISIONS OF SUPREME COURT RULE 12(3) (omitted in printing)

98-99 PRAECIPE (omitted in printing)

100 Clerk's Certificate to foregoing transcript omitted in printing.

101-102 In the Supreme Court of the United States
October Term, 1953

No. 439

UNITED STATES OF AMERICA, APPELLANT

v.

EMPLOYING LATHERS ASSOCIATION OF CHICAGO AND VICINITY, ET AL.

On Appeal from the United States District Court for the Northern District of Illinois

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed November 4, 1953

a. Appellant adopts for its statement of points upon which it intends to rely in its appeal to this Court the points contained in its Assignment of Errors heretofore filed.

b. Appellant designates for printing by the Clerk of this Court the entire record in this cause as filed in this Court pursuant to appellant's praecipe to the clerk of the United States District Court for

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the Northern District of Illinois, except that Items 8, 10, 11 and 12 of said praecipe may be omitted from printing.

November 4, 1953.

ROBERT L. STERN,
Acting Solicitor General.

103 [File endorsement omitted.]

104 Supreme Court of the United States
October Term, 1953

No. 439

UNITED STATES OF AMERICA, APPELLANT

v.

EMPLOYING LATHERS ASSOCIATION OF CHICAGO AND VICINITY, ETC., ET AL.

Appeal from the United States District Court for the Northern District of California

ORDER NOTING PROBABLE JURISDICTION—November 30, 1953

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

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